APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED OCTOBER 31, 2005

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 05-1058

LOCAL 15, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

Midwest Generation, EME, LLC,

Intervenor.

Petition for Review of an Order of the
National Labor Relations Board.
No. 13-CA-39643-1

ARGUED SEPTEMBER 27, 2005—DECIDED Oct. 31, 2005.

Appendix A

Before FLAUM, *Chief Judge*, and BAUER and SYKES, *Circuit Judges.*

FLAUM, Chief Judge. Petitioner Local 15, International Brotherhood of Electrical Workers, AFL-CIO ("Union") petitions this Court for review of an order of the National Labor Relations Board ("NLRB" or "Board") finding that the Intervenor, Midwest Generation, EME, LLC ("Midwest"), did not violate sections 8(a)(1) and (3) of the National Labor Relations Act ("NLRA"). 29 U.S.C. §§ 158(a)(1) and (3). Because substantial evidence did not support the Board's decision, we reverse the holding and remand to the Board to determine whether Midwest's unfair labor practices render the current collective bargaining agreement void.

I. Background

The Union began an economic strike against Midwest on June 28, 2001, over stalled negotiations for a new collective bargaining agreement. Approximately 1150 workers went on strike. Eight employees refused to strike ("non-participants"). During the course of the strike, 47 employees who were part of the Union made individual offers to return to work ("crossovers"). Midwest accepted each of these offers and reinstated the individual employees. Sixteen employees crossed the picket line in July, and thirty-one crossed between August 1 and August 30. Six additional employees made offers to return to work shortly before the strike ended on August 31. Midwest returned these last six crossovers to the workforce between September 1 and September 6. In all, a combination of sixty-one crossovers and non-participants offered to return to the workforce before the end of the strike.

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Midwest continued to operate during the course of the strike, relying upon supervisors, contractors, and some temporary replacement employees. Midwest hired no permanent replacements. No evidence that the sixty-one non-participants and crossovers were necessary to maintain operations during the strike was submitted. Employees who returned to work were not questioned concerning their status in the Union and Midwest did not encourage or assist any employee in resigning from the Union.

On Friday, August 31, 2001, after failing to reach a collective bargaining agreement, the Union members voted to end their strike and offered to return to work unconditionally. Midwest initially gave no response to this offer, but on September 6, 2001, Midwest informed the Union that it was instituting a lockout. The Union alleges that the purpose of the six-day delay in announcing the lockout was to process the last six crossovers.

The lockout did not include those sixty-one workers who offered to return to work before the Union made its unconditional offer on August 31. Midwest locked out any employee who sought to return to work after the Union had voted to end the strike; and the lockout continued until the parties reached a collective bargaining agreement. The announced purpose of the lockout was to exert pressure upon the Union to meet Midwest's contract demands.

On October 3, 2001, the Union voted on Midwest's "final offer." The Union informed Midwest that it believed if the NLRB later found Midwest had committed an unfair labor practice during the lockout, the contract would be "void

because the Company's unfair labor practice[s] . . . coerced the employees into accepting it. Nothing the Union or its representatives say or do should be interpreted as a waiver of this position." On October 3, 2001, the Union rejected the offer. The Union sent a similar notification letter before a second vote on the same contract. On the second vote, the contract passed easily. The lockout officially ended on Monday, October 22, 2001.

Midwest informed the Union in early September that it would not allow employees who had not previously offered to return to work access to their jobs "until a new contract is agreed to and ratified[.] [E]mployees who had already returned to work, or were scheduled to return to work prior to Friday, August 31, 2001 [would] be allowed to continue to work."

Although at times all but eight of the approximately 1,150 workers were on strike, Midwest maintained normal operations throughout the strike and lockout. Midwest contends that the non-strikers and crossovers "helped the company weather the work stoppage's effects." Midwest also contends that the sixty-one employees had "abandoned an economic strike undertaken for the express purpose of supporting the Union's bargaining demands."

In response to an unfair labor practice charge filed by the Union, the General Counsel of the National Labor Relations Board issued a complaint against Midwest on March 7, 2002, for unfair labor practices in violation of NLRA sections 8(a)(1) and (3). 29 U.S.C. §§ 158(a)(1) and (3). The complaint alleged that Midwest committed an unfair

labor practice by refusing to reinstate employees who were on strike at the time of an unconditional offer to return to work, while allowing other workers who had already returned or planned to return to work access to their jobs. The parties waived an ALJ hearing and stipulated to the record. The Board issued a Decision and Order on September 30, 2004, finding that Midwest had not violated the Act. There was a dissent from the three-member board decision.

There is no evidence of bad faith by either party, nor is there any evidence that Midwest gave the crossovers or non-participants special treatment before or after the lockout.

The only issue for resolution submitted to the Board, and therefore the only issue for this Court to review, was stipulated to by the parties:

> Whether the Company violated Sections 8(a)(1) and (3) of the [National Labor Relations] Act by locking out and/or refusing to reinstate those employees who were on strike at the time of the union's unconditional offer to return to work, while not locking out and/or reinstating those individuals employed by the Company who, prior to the union's unconditional offer to return to work, had ceased participating in the strike by making an offer to return to work, and had either returned to work or scheduled a return to work at the Company?

Appendix A

II. Discussion

A. Standard of Review/Method of Analysis

Board Rulings are "entitled to considerable deference so long as [they are] rational and consistent with the [National Labor Relations] Act." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787, 110 S.Ct. 1542, 108 L.Ed.2d 801 (1990); *see also NLRB v. United Food, Commercial Workers Union, Local 23,* 484 U.S. 112, 123, 108 S.Ct. 413, 98 L.Ed.2d 429 (1987). This Court, however, is not "obliged to stand aside and rubberstamp [its] affirmance of administrative decisions that [it] deem[s] inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *NLRB v. Brown,* 380 U.S. 278, 291, 85 S.Ct. 980, 13 L.Ed.2d 839 (1965).

This complaint was brought under section 10(a) of the National Labor Relations Act, 29 U.S.C. § 160(a), for a violation of sections 8(a)(1) and (3) of the Act. 29 U.S.C. §§ 158(a)(1) and (3). Section 8 states that it is an unfair labor practice for an employer to interfere with employees' rights that are protected by section 7 of the NLRA, which includes the right to "engage in . . . activities for the purpose of collective bargaining." 29 U.S.C. § 157. The basic procedure to evaluate whether a company has engaged in an unfair labor practice was first outlined by the Supreme Court in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (1967).

The first question in the *Great Dane* framework is whether the employer's conduct is "inherently destructive

of important employee rights." 388 U.S. at 34, 87 S.Ct. 1792. Actions that harm the collective bargaining process, interfere with employees' right to strike, or are taken against employees based upon union status are "inherently destructive." *Esmark, Inc. v. NLRB,* 887 F.2d 739, 748 (7th Cir.1989). To be "inherently destructive," the effect on the collective bargaining process must be more than temporary; it must instead establish a barrier to future collective bargaining. *Id.* If an action by an employer is inherently destructive of important rights, no proof of an anti-union motivation is needed. *Great Dane,* 388 U.S. at 34, 87 S.Ct. 1792.

A harmful action by an employer that is not inherently destructive is classified as "comparatively slight." These two categories, "inherently destructive" harm and "comparatively slight" harm, make up the two prongs of the *Great Dane* framework. Under the first prong of the *Great Dane* test ("inherently destructive"), an employer's actions are submitted to a stringent test. Such actions are permissible only if after balancing business justifications against employee rights, the business justification is found to be superior. Under the second prong of the *Great Dane* test, ("comparatively slight"), an employer's actions are more likely to be justified. "[A] finding of comparatively slight harm calls for a threshold test of business justification, rather than a balancing of interests." *Int'l Bhd. of Boilermakers v. NLRB,* 858 F.2d 756, 762 n. 2 (D.C.Cir.1988). If an individual employer's actions cannot be justified under the comparatively slight harm standard, which requires a legitimate and substantial business justification, they clearly cannot be justified under the "inherently destructive" standard.

Under either prong, once it has been established that the employer's conduct negatively affects protected section 7 rights, the key question for the Board, informed by *Great Dane,* is whether the employer can state a business justification for its actions. If an employer can show no legitimate and substantial business justification, the lockout is presumptively an unfair labor practice under either prong of the *Great Dane* analysis.

Thus, the question of whether a "legitimate and substantial" business justification exists is a threshold question, properly asked prior to any decision as to whether an action is "comparatively slight" or "inherently destructive" under *Great Dane.* If a legitimate and substantial business justification is found for an employer's action, the question of whether the harm caused was "inherently destructive" or "comparatively slight" is then examined and the *Great Dane* analysis proceeds.

B. Failure to Prove a Business Justification

Apart from which *Great Dane* prong a particular case might be analyzed under:

> once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, *the burden is upon the employer to establish that he was motivated by legitimate objectives* since proof of motivation is most accessible to him.

NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (1967) (emphasis added); *see also Inland Steel Co.*, 257 N.L.R.B. 65, 68 (1981), *enforced. mem.* 681 F.2d 819 (7th Cir.1982) ("The employer alone is responsible for its conduct and it alone bears the burden of explaining the motivation for its actions.").

A "legitimate and substantial" business justification must have a non-frivolous purpose. *Harter Equipment Inc.*, 280 N.L.R.B. 597, 600 n. 9 (1986); *see also Great Dane*, 388 U.S. at 38, 87 S.Ct. 1792. The issue then is whether Midwest has shown that its lockout had any business justification that was neither frivolous nor based upon an impermissible violation of section 7 rights.

The Board's majority opinion advanced two arguments in support of its finding that Midwest instituted the partial lockout for the valid purpose of "bringing economic pressure to bear in support of its legitimate bargaining position." *Midwest Generation*, 343 N.L.R.B. No. 12, 2004 WL 2235905 *3 (2004).[1] First, the Board stated that partial lockouts are legal "when justified by operational needs and without regard to union membership status." *Id.* at *4 (citing *Bali Blinds Midwest*, 292 N.L.R.B. 243, 246- 47 (1988); *Laclede Gas Co.*, 187 N.L.R.B. 243, 243-44 (1970)). Second, the Board concluded that locking out only those participating

1. There is a discrepancy between the numbering of the pages in the slip opinion produced by the Board and given to this Court by the parties and the page numbers in this opinion as available on the Westlaw service. The page numbers cited in this opinion correspond to the page numbers in the slip opinion, which is part of the record.

in the strike on August 31 was a lawful means of pressuring holdouts to abandon their bargaining position.

The dissent responded to these justifications for the partial lockout, noting:

> Notwithstanding the complete lack of supporting argument and evidence, the majority sua sponte proclaims that the Respondent's operational needs justified the partial lockout. The majority's concoction of a post hoc operational rationalization for the partial lockout does not and cannot fulfill the Respondent's obligation to proffer a legitimate and substantial business justification.

Id. at *6 (Walsh, dissenting) (citing *Inland Steel Co.*, 257 N.L.R.B. 65, 68 (1981), *enforced. mem.* 681 F.2d 819 (7th Cir.1982)).

1. Operational needs did not justify the partial lockout.

Prior to the Board's decision, Midwest offered no proof that its operational needs justified the partial lockout. Indeed, the record indicates that Midwest's operational needs were being "successfully maintained . . . through the efforts of supervisory personnel, contractors, and some temporary replacement employees." In raising the operational needs justification sua sponte, the Board cited two cases, *Bali Blinds Midwest,* 292 N.L.R.B. 243, 246-47 (1988) and *Laclede Gas Co.*, 187 N.L.R.B. 243, 243-44 (1970). These cases are not analogous to the factual situation faced by Midwest. Rather,

these cases illustrate the extreme business exigencies necessary to justify a partial lockout based upon operational needs.

In *Bali Blinds Midwest,* the employer's partial lockout was justified because it ensured that repeated work stoppages, which were legitimately feared, would not delay production and result in a loss of customers. 292 N.L.R.B. 243, 246-47 (1988). In *Laclede Gas Co.,* the Board found that the need to ensure continuing business operations and avoid public hazards justified the employer's disregard of normal seniority practices during a lockout. 187 N.L.R.B. 243, 243-44 (1970) ("[T]he temporary shutdown of the construction crew's operations was actually necessitated by the exigencies of the business operation[.] . . . [O]perating on the basis of daily contract extensions was difficult, unproductive, and potentially dangerous to the public [.] . . . [The lockout] was motivated by a desire to eliminate those operations which negotiations had rendered tentative and to protect the [employer] from overextending itself at a critical moment, all of which were essentially defensive purposes[.]") (internal quotation marks omitted). There has been no comparable allegation of exigent circumstances in the instant case.

In its brief, Midwest attempts to support the Board's operational needs justification by citing additional cases in which partial lockouts were permitted. Among those cases is *General Portland, Inc.* 283 N.L.R.B. 826 (1987). Unlike the factual situation faced by Midwest, *General Portland* illustrates an extreme situation in which operational needs justify a partial lockout. General Portland allowed employees to continue to manage enormous kilns that operate at 2700

degrees Fahrenheit and take between twelve hours and three days to shut down completely. Crossovers continually staffed these kilns in an effort to prevent "explosions, injury, and damage." *Id.* at 827. In contrast, the record is silent as to any necessity that would sanction the use of a partial lockout by Midwest.

The facts of this case further belie the operational needs justification. First, Midwest's own claims demonstrate that it successfully maintained operations throughout the strike without the use of crossover employees or non-strikers. Midwest does not argue that the lockout was based upon operational needs, but rather states its intent "to pressure [the employees] to abandon [their] demands." Second, the last six crossover employees did not even start work until after the August 31 unconditional offer to return to work, which demonstrates that these employees were unnecessary for continued operation. Third, early in the strike Midwest was able to maintain operations with only eight of the approximately 1,150 employees who were members of the bargaining unit. The claim that these eight employees and/or the last six crossovers, together representing less than 2% of the total bargaining unit, were so vital to the maintenance of business operations that it was necessary for Midwest to violate employees' section 7 rights stretches the bounds of credulity.

Every indication in the stipulated facts is that the crossovers and non-strikers were unnecessary to the continuation of business operations. Midwest and the majority opinion of the Board charge the dissent with advocating for a standard of "indispensab[ility] to continued

operations in order to be retained" during a partial *659 lockout. The dissent, however, never employs the word "indispensable." The dissent accurately notes that the "Respondent does not even argue that it needed the non-strikers and crossovers to maintain operations during the lockout." *Midwest Generation,* 343 N.L.R.B. No. 12, 2004 WL 2235905 *7 (Walsh, dissenting) (2004).

In any event, a standard less demanding than "indispensable" cannot provide employers with carte blanche to lock out employees of their choosing without regard to seniority or any other criteria. Such an approach would allow employers acting under the guise of maintaining business operations to engage in exactly the type of action Midwest undertook: punishing those who stood with the Union and rewarding those who crossed picket lines.

Demanding more than Midwest's labeling of its conduct as "necessary for business operations" does not establish strike-hiring practices that are difficult for employers to comply with. Instead, it merely avoids creating a "business operations" exception with no limiting principle, which would sanction discriminatory conduct by an employer where the employer chooses to announce its position as "necessary for business operations" without evidence supporting such a need. Simply put, to justify a partial lockout on the basis of operational need, an employer must provide a reasonable basis for finding some employees necessary to continue operations and others unnecessary.

2. The partial lockout was not justified as a lawful means of economically pressuring holdouts.

Throughout the course of this litigation, Midwest contended that it allowed the non-strikers and crossovers to return to work because they "had removed themselves from the Union's economic action," making it unnecessary to pressure them into abandoning the Union's bargaining position. This allegation rests on the proposition that "working for a struck employer may, without more, be equated with abandonment of the Union's bargaining demands." *Midwest Generation,* 343 N.L.R.B. No. 12, 2004 WL 2235905 *6 (Walsh, dissenting) (2004). This assumption is fatally flawed. There can be several reasons why an employee might choose to cross a picket line. Abandonment of the Union's bargaining demands is merely one possible explanation, standing alongside individual financial motivations, personal relationships with employers, indifference, an attempt to impress management, etc. Midwest has failed to offer any direct correlation between employees' non-participation in a strike and lack of support for the Union's demands.

Midwest claims that it was unnecessary to lock out the crossovers and non-strikers because they had taken "affirmative action in derogation of the Union's bargaining position." Any business justification that relies upon workers having "removed themselves from the Union's economic action," or argues that by returning to their jobs, workers had abandoned their demands cannot carry the day in this case. When Midwest announced the selective lockout, all of the employees in the bargaining unit had removed themselves

from the economic strike by offering to return to work. The only distinction between employees was whether an individual worker had made his or her offer to return as part of the Union's action or individually.

Midwest argues that an employee who has returned to work no longer demonstrates a commitment to the Union's position. Therefore, no economic pressure against such an employee is required. What Midwest fails to note is that at the time of the lockout, all employees had offered to return to work.

There is no evidence in the record indicating why individual employees chose not to participate in the strike. It is unclear and unknown whether non-strikers and crossovers voted for or against Midwest's collective bargaining agreement proposals. The Board infers that "it was no longer necessary for the Respondent to place additional pressure upon [crossover workers and non-strikers] in order for [Midwest] to achieve its bargaining goals." *Midwest Generation,* 343 N.L.R.B. No. 12, 2004 WL 2235905 *5. This statement is without affirmation in the record of this case. Nothing has been presented to distinguish the motivation of those who offered to return to work before August 31 and those who offered to return to work after August 31. Given this absence of evidence, the Board's claim that additional pressure was necessary for one group, but not another, is unsupportable.

The Board relied upon Midwest's post hoc subjective beliefs to find that crossovers and non-strikers did not back the Union's bargaining position. In turn, Midwest relies upon

a common sense notion that employees who cross a picket line have abandoned the Union's position. While this is not an unreasonable conclusion, it is not supported by any evidence beyond mere conjecture.

The Board also justified the use of a partial lockout on the basis that "there is nothing in the law that requires an employer to use maximum economic pressure." *Midwest Generation,* 343 N.L.R.B. No. 12, 2004 WL 2235905 *5. While this statement is a truism, it does not address the relevant question before the Board. The burden remains upon the employer to prove that it had a legitimate and substantial basis for its actions. In this case, the Board appears to find sufficient any reason presented by Midwest without evidence of a "legitimate and substantial" basis for distinguishing between those employees it locked out and those it did not.

While we find no foundation for the assumption that those employees who crossed the picket line were not supporters of the Union's position, assuming arguendo that Midwest could irrefutably prove that crossovers and non-strikers had abandoned the Union's bargaining position, it still could not discriminate on this basis.

Both the NLRB and the Fifth Circuit have found that an employer "may not discriminate against certain employees merely because it anticipates that they will honor a picket line or otherwise engage in protected activity." *National Fabricators v. NLRB,* 903 F.2d 396, 400 (5th Cir.1990). An employer's discriminatory lockout on the basis of a protected activity is unlawful even when it is supportive of an employer's bargaining position.

> Lockouts are not all protected . . . . The Seventh Circuit in *Inland Trucking Co. v. N.L.R.B.*, 440 F.2d 562 (1971), affg. 179 NLRB 350, cert. denied 404 U.S. 858, 92 S.Ct. 106, 30 L.Ed.2d 100, held that an employer violated Section 8(a)(1) and (3) by locking out its employees and continuing operation with the use of new hires. The *American Ship Building* rule does not give the employer license to pick and choose among its employees and suspend those whose protected picket line activities are most damaging to it. The mere selection of such an employee from among all those in the unit for suspension is per se discriminatory.

Thrift Drug Co., 204 N.L.R.B. 41, 43 (1973).

The Board in this case appears to launch a new approach with no discernable parameters. If employers were free to exercise economic penalties selectively against those employees whom they believe economic coercion would be most effective, an employer could take discriminatory actions that have traditionally been barred. Under the Board's analysis, an employer could choose to lock out only union leaders or only employees it believes voted against a proposed contract. This type of discrimination cannot be a legitimate and substantial business justification for a partial lockout.

Not only has Midwest failed to put forth a legitimate and substantial business justification, but in its attempts to justify the partial lockout it has given further support to the Union's claim that the lockout was used in a retributive

fashion to discourage employees from exercising their section 7 right to strike.

"[T]here is an obvious disparate treatment of employees," when an employer locks out

> only those employees who, by striking, had identified themselves as union adherents, while continuing to operate with those employees who had not joined the strike[.] . . . [B]y deliberately limiting the impact of the lockout to those employees who had struck, [an employer] discriminate[s] against them for striking, and by such action violate[s] Section 8(a)(3) and (1) of the Act.

McGwier Co. v. NLRB, 204 N.L.R.B. 492, 496 (1973).

In the context of collective bargaining negotiations, nearly all employer actions are attempts to win an economic battle. Merely because retribution against strikers may be effective does not make such actions legitimate and substantial. The fact that employers have acted with the "best judgment as to the interests of their business . . . has not been deemed an absolute defense to an unfair labor practice charge." *NLRB v. Erie Resistor Corp.,* 373 U.S. 221, 229 n. 8, 83 S.Ct. 1139, 10 L.Ed.2d 308 (1963).

Based on the record presented in this appeal, there is no line that can be drawn between those employees that agreed to return to work before August 31 and those employees who agreed to return to their positions after August 31. As of the

time of the lockout, every employee had made an unconditional offer to return to work. Without a valid basis for distinction between those locked out and those allowed to work, Midwest's claim of a legitimate and substantial business justification fails.

3. Midwest displayed anti-union animus.

If Midwest's claim of no anti-union animus were to have any basis, it necessarily would contradict its earlier claim of a legitimate and substantial business justification. Either employees were locked out in a completely blind fashion, thereby offering no legitimate and substantial business justification, or they were chosen on the basis of their Union activities and therefore the action was based upon invalid anti-union motivations.

By acting only against those who had exercised their section 7 right to strike, Midwest appears to have demonstrated an anti-union animus. The *only* distinction between the two groups of employees at the time of the lockout was their participation in Union activities. Discriminating in a way that has a natural tendency to discourage participation in concerted union activities is a violation of section 8(a)(3) of the National Labor Relations Act. *See Erie Resistor Corp.*, 373 U.S. at 233, 83 S.Ct. 1139; *see also Radio Officers' Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 39-40, 74 S.Ct. 323, 98 L.Ed. 455 (1954). As the dissent in this case succinctly stated, "The effect of the lockout's disparate treatment of employees is to undermine adherence to the Union by demonstrating to employees the advantages from the standpoint of job security

of refraining from concerted activity." *Midwest Generation,* 343 N.L.R.B. No. 12, 2004 WL 2235905 *7 (Sept. 30, 2004) (Walsh, dissenting) (citing *McGwier Co.,* 204 N.L.R.B. 492, 496 (1973); *O'Daniel Oldsmobile, Inc.,* 179 N.L.R.B. 398, 402 (1969)).

The Board argued in its brief to this Court that employees could have avoided " 'punishment' by simply agreeing to the Company's bargaining demands." Following this logic, a partial lockout would be valid provided any offer, no matter what the terms, was made to the employees. This approach would permit inappropriate deference to employers' intent in partial lockout situations.

A partial lockout is a significant measure that requires a justification beyond economic effectiveness. The fact that employees could avoid partial lockouts by agreeing to employer demands would in effect validate all partial lockouts. Undoubtedly, this would render ineffective the requirement of a legitimate and substantial business justification for discriminatory employer action and would be in derogation of nearly four decades of employee protection. *See NLRB v. Great Dane Trailers, Inc.,* 388 U.S. 26, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (1967); *see also* 29 U.S.C. §§ 157, 158(a)(1), (3).

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III. Conclusion

For the reasons set forth above, we REVERSE the findings of the Board and REMAND to the Board with instructions to find that the partial lockout was an unfair labor practice. We also REMAND to the Board to consider whether this unfair labor practice coerced the Union and its members into ratifying Midwest's contract offer, thereby voiding the collective bargaining agreement.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD DATED SEPTEMBER 30, 2004

NATIONAL LABOR RELATIONS BOARD

Case 13-CA-39643-1

MIDWEST GENERATION, EME, LLC *and* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 15, AFL-CIO.

September 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

Upon a charge filed on September 6, 2001, by International Brotherhood of Electrical Workers, Local 15, AFL-CIO (the Union), the General Counsel of the National Labor Relations Board issued a complaint on March 7, 2002, against Midwest Generation, EME, LLC (the Respondent), alleging that it had engaged in certain unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the National Labor Relations Act. Copies of the charge and complaint were served on the Respondent. The Respondent filed a timely answer denying the commission of any unfair labor practices.

On May 21, 2002, the Union, the Respondent, and the General Counsel filed with the Board a joint motion to transfer this proceeding to the Board and stipulation of facts.[1]

1. The parties thereafter filed a supplement to the stipulation of facts.

They agreed that the charge, the complaint, the Order rescheduling hearing, the Order postponing hearing indefinitely, the stipulation, and the accompanying joint exhibits constitute the entire record in this case, and that no oral testimony is necessary or desired by any of the parties. The parties waived a hearing, the making of findings of fact and conclusions of law, and the issuance of a decision by an administrative law judge. On November 20, 2002, the Acting Executive Secretary, by direction of the Board, issued an order approving the Stipulation, and transferring the proceeding to the Board. The Union, the Respondent, and the General Counsel thereafter each filed a brief. In addition, the Respondent and the General Counsel filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record in the case, the Board makes the following findings of fact and conclusions of law and issues the following Order.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office located in Chicago, Illinois, and facilities located in the central and northern part of the State of Illinois, is engaged in the production and wholesale sale of electricity. The Respondent annually purchases and receives goods at its facilities which are valued in excess of $50,000 from points outside of

Illinois. The parties have stipulated, and we find, that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The parties have stipulated that "the only issue for resolution before the Board" is:

> Whether the [Respondent] violated Sections 8(a)(1) and (3) of the Act by locking out and/or refusing to reinstate those employees who were on [an economic] strike at the time of the union's unconditional offer to return to work, while not locking out and/or reinstating those individuals employed by the [Respondent] who, prior to the union's unconditional offer to return to work, had ceased participating in the strike by making an offer to return to work, and had either returned to work or scheduled a return to work at the [Respondent]?

For the reasons set forth below, we find that the Respondent did not violate the Act by its lockout. We shall accordingly dismiss the complaint.

Appendix B

A. *Factual Background*

In June 2001,[2] the Union and the Respondent met to negotiate a successor collective-bargaining agreement following the expiration of their previous agreement. As of June 28, the parties had not reached agreement on a new collective-bargaining agreement. The parties have stipulated that throughout the course of negotiations, the Respondent and the Union met and bargained in good faith.

On June 28, the Union commenced an economic strike in support of its bargaining position. The entire bargaining unit—approximately 1150 employees—participated in the strike as of its commencement, with the exception of approximately 8 bargaining unit members who continued working (nonstrikers).

During the course of the economic strike, the Respondent maintained operations using supervisory personnel, contractors, and some temporary replacement employees. The Respondent did not use permanent replacements during the strike, or during its subsequent lockout.

Some bargaining unit employees returned to work for the Respondent during the strike. From June 28 to August 31, approximately 47 striking employees individually offered to return to work, and Respondent accepted them back (these employees are hereafter referred to as crossover employees). The parties have stipulated that the Respondent accepted these crossover employees back to work without regard to their membership status in the Union.

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2. All dates are in 2001 unless otherwise noted.

Appendix B

As of August 31, the Respondent and the Union had not reached agreement on the terms of a new collective-bargaining agreement, and were still engaged in bargaining for a new contract. By letter dated August 31, the Union notified the Respondent that it was terminating the strike, and made an unconditional offer to return to work on behalf of all strikers.

The parties held a bargaining session on September 4. The Respondent advised the Union that it was evaluating the Union's offer to return to work, and had not yet reached any decision. By letter dated September 6, the Respondent declined the Union's offer to return to work, and instituted a lockout of all those individuals on strike as of the date of the offer (August 31). The Respondent's September 6 letter notified the Union that it "will not allow striking employees to return to work until a new contract is agreed to and ratified by your membership." The letter stated that "[t]hose employees who had already returned to work,[3] or were scheduled to return to work, prior to Friday, August 31, 2001[4] will be allowed to continue to work."

Many bargaining unit employees sought to return to work after the lockout commenced. The Respondent informed them

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3. This referred to the 8 nonstrikers, and the 47 crossover employees who ceased participating in the strike from June 28 to Aug. 31.

4. This referred to six employees who the Respondent permitted to return to work between Sept. 1-5. They had ceased participating in the strike, and had scheduled with the Respondent their return to work, prior to the Union's Aug. 31 offer to return.

they could not return until a new contract was agreed to and ratified by the union membership.

Following the implementation of the lockout, the Respondent and the Union continued to meet and bargain for a new collective-bargaining agreement. On October 16, the bargaining unit ratified the Respondent's September 21 contract proposal. On October 22, the Respondent ended the lockout, and all locked out employees who opted to do so returned to work. The parties executed a collective-bargaining agreement effective from October 22 to December 31, 2005.

B. *The Parties' Contentions*

The General Counsel contends that the Respondent's partial lockout of only full-term strikers, but excluding nonstrikers and crossover employees, is unlawful under both the "comparatively slight" and "inherently destructive" tests set forth in *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967). The General Counsel reasons with respect to the former that the Respondent's asserted business justification for the lockout—to pressure the Union to accept the Respondent's bargaining proposals—fails to explain why the Respondent implemented a partial lockout targeting only full-term strikers. The General Counsel accordingly argues that the Respondent has failed to provide any substantial business justification for its partial lockout. The General Counsel further argues that there is "ample evidence" that Respondent acted with antiunion animus, because it targeted employees for lockout based on their Section 7 activity: it locked out only those employees who participated in the strike until its end, but did not lock out those who did not strike or who

abandoned the strike before its end. The General Counsel additionally contends that the timing of the lockout shows antiunion animus: the Respondent purposefully delayed implementing the lockout until September 6 to allow the six crossover employees who had offered to return to work before August 31 to be reinstated before the start of the lockout. It is thus asserted that Respondent timed its lockout to ensure that only "ardent" union supporters were affected.

The General Counsel alternatively argues that because the partial lockout expressly targeted only full-term strikers it was inherently destructive of employees' Section 7 rights. The General Counsel contends that the Respondent's partial lockout carried the clear message that supporting the Union will result in severe penalties: that those who participate in the strike and adhere to the Union's bargaining demands will be locked out, while those who do not will be rewarded with continued work.

The Union argues, for substantially the same reasons as the General Counsel, that the Respondent's partial lockout is unlawful under both tests set forth in Great Dane. The Union further contends, however, that the unlawful lockout coerced it to accept the Respondent's contract proposal, and the contract should therefore be set aside.

The Respondent counters that its lockout was in furtherance of securing its lawful bargaining proposals, which constitutes a settled business justification under *American Ship Building Co. v. NLRB*, 380 U.S. 300, 312 (1965). The Respondent explains that the lockout applied only to employees who were actively participating in the strike in

support of the Union's bargaining demands, in order to pressure them to abandon those demands. The Respondent asserts that the crossover employees and the nonstrikers had already "removed themselves from the Union's economic action," and pressuring them via lockout was thus unnecessary. The Respondent further argues that the partial nature of the lockout resulted not from its conduct, but from the protected choice of the nonstrikers and the crossovers not to participate in the strike. The Respondent additionally argues that there is no evidence that it acted with antiunion animus, but rather the parties have stipulated that it at all times bargained in good faith for a successor contract. The Respondent asserts that in these circumstances its lockout may not be found unlawful under either test set forth in Great Dane.

III. DISCUSSION

To determine whether the Respondent's lockout was motivated by antiunion animus in violation of Section 8(a)(3) of the Act, the Board applies the framework developed by the Supreme Court in *NLRB v. Great Dane Trailers*, *supra*, 388 U.S. at 34:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of

> the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. [Emphasis in original.]

See *Central Illinois Public Service Co.*, 326 NLRB 928, 930 (1998), *rev. denied sub nom. Local 702, IBEW, AFL-CIO v. NLRB*, 215 F.3d 11 (D.C. Cir. 2000), *cert. denied* 531 U.S. 1051 (2000). The Supreme Court has held that a lockout for the "sole purpose of bringing economic pressure to bear in support of [the employer's] legitimate bargaining position" is not unlawful and is not inherently destructive of employee rights. *American Ship Building Co. v. NLRB*, *supra*, 380 U.S. at 318.

The evidence here clearly establishes that the Respondent's lockout was for the purpose of applying economic pressure in support of its legitimate bargaining proposals.[5] The Respondent expressly stated in its September 6 letter to the Union announcing the lockout that it would end as soon as "a new contract is agreed to and ratified by your membership." The Board has made clear that an employer's "assertion that it would not offer the strikers reinstatement until a new agreement was reached" is "sufficient to inform the striking employees that the employer was locking them out in support of its bargaining position." *Ancor Concepts, Inc.*, 323 NLRB 742, 744 (1997), *enf. denied on other grounds* 166 F.3d 55 (2d Cir. 1999). It is thus clear

5. No party argues that the Respondent's bargaining proposals were unlawful or a nonmandatory subject.

that the lockout here, brought in support of the Respondent's legitimate bargaining position, cannot be considered inherently destructive of employee rights under Great Dane. See *Central Illinois Public Service Co., supra*, 326 NLRB at 930-931.

Accordingly, we shall treat the Respondent's lockout as having a "comparatively slight" impact on employee rights and apply the second Great Dane test to determine the lockout's legality. "[I]f the action is deemed to have only a comparatively slight impact on employee rights, an affirmative showing of antiunion motivation must be made to sustain a violation under the second test of Great Dane, if the employer has first come forward with evidence of a legitimate and substantial business justification for its conduct." *Id.*, 326 NLRB at 930.

The Respondent Has Presented a Legitimate and Substantial Business Justification

The Board has explained that "[u]rging consideration and acceptance of one's bargaining proposals is clearly a legitimate bargaining position" and that "application of economic pressure in support of this bargaining position constitutes a legitimate and substantial business justification for the lockout within the meaning of Great Dane." *Central Illinois Public Service Co., supra*, 326 NLRB at 932. As discussed above, the record shows that the Respondent's lockout was brought for the purpose of bringing economic pressure to bear in support of its legitimate bargaining position. The Respondent has consistently expressed this settled business justification throughout these proceedings,

and there is no basis for concluding that this was not the real reason for its lockout.[6]

The Respondent has further justified the partial nature of its lockout. The Respondent explains that the lockout applied only to employees who were actively participating in the strike on August 31 in support of the Union's bargaining demands, in order to pressure them to abandon those demands. Neither the General Counsel, the Union, nor the dissent contend that this is an improper justification for locking out employees.

Moreover, it is settled that the Board recognizes the legality of partial lockouts when justified by operational needs and without regard to union membership status. See *Bali Blinds Midwest*, 292 NLRB 243, 246-247 (1988); *Laclede Gas Co.*, 187 NLRB 243, 243-244 (1970). We find that these considerations further buttress the lawfulness of Respondent's partial lockout.

First, there is no dispute that the partial nature of the lockout was unrelated to union affiliation; the parties have stipulated that the Respondent accepted bargaining unit employees back to work without regard to membership status in the Union. Second, there can be no dispute that the Respondent sought to effectively continue operations during the lockout, as it had while successfully weathering the strike. Of course, "there can be no more fundamental employer

6. Compare, e.g., *Black Entertainment Television*, 324 NLRB 1161 (1997) (when an employer vacillates in offering a consistent account of its actions, an inference may be drawn that the real reason for its conduct is not among those asserted).

interest than the continuation of business operations." *Harter Equipment, supra*, 280 NLRB at 599. The Respondent lawfully used supervisory personnel, contractors, and temporary employees to maintain operations during the strike—as well as the crossovers and the nonstrikers— and continued to do so during the lockout.[7] It is self-evident that the Respondent's retention of the crossover employees and nonstrikers during the lockout augmented its effort to maintain continued production. The Respondent's retention of these employees during the lockout was fully consistent with its lawful use of temporary replacements and others to maintain operations during the lockout.

Our dissenting colleague does not and cannot dispute that the crossovers and nonstrikers lawfully aided the Respondent's maintenance of operations during the strike. Similarly, the dissent does not dispute that the Respondent lawfully could have hired temporary replacement employees for assistance in maintaining operations during the lockout. There is no support for the dissent's contention that the Respondent had to establish that the crossovers and the nonstrikers were indispensable to continued operations before it could retain them during the lockout instead of looking to less experienced temporary replacements. The effect of the dissent's position is to visit on the crossover and nonstriking employees the consequences of the gamble taken by the employees who elected to remain on strike, by placing them in a worse position than they would have been in if the strike had not ended. See *Encino-Tarzana Regional*

7. See *Harter Equipment, supra*, 280 NLRB at 600 (employer's use of temporary replacements during a lawful lockout does not violate the Act).

Medical Center, 332 NLRB 914 (2000) (employer lawfully suspended its "call off" procedure during period following strike, when replacement employees were lawfully working, where implementing it would have resulted in displacement of crossovers by more senior former strikers). This we decline to do.

The Lockout Was Not Motivated By Antiunion Animus

Notwithstanding our finding that that the lockout as implemented served a legitimate business interest, a violation of Section 8(a)(1) and (3) may still be found if the evidence warrants an inference that the Respondent's use of the lockout was motivated by antiunion animus. See *Central Illinois Public Service Co.*, 326 NLRB at 933. We have carefully searched the record and find no evidence that the lockout was motivated by antiunion animus.

The parties have stipulated that the Respondent bargained in good faith throughout the negotiations. The Respondent further fully complied with an information request made by the Union. The General Counsel does not allege any violations of the Act by the Respondent other than the partial lockout itself. With regard to the lockout, the parties have stipulated that the Respondent accepted crossover employees back to work without regard to their membership status in the Union.[8] We accordingly find this to be a case in which

8. Compare *Schenk Packing Co.*, 301 NLRB 487 (1991) (lockout unlawful where respondent announced that union members would not be hired as replacements during the lockout and unit employees would be considered for employment only if they resigned from the union).

"not only is there absent in the record any independent evidence of improper motive, but the record contains positive evidence of the [Respondent's] good faith." *NLRB v. Brown Food Store*, 380 U.S. 278, 290 (1965).[9]

Apparently recognizing that there is no evidence of discrimination based upon membership, our dissenting colleague argues that there was discrimination based upon the Section 7 right to continue striking. The argument is that the Respondent distinguished between those who did not strike or who abandoned the strike and those who remained on strike until the Union called the strike off. Concededly, the Respondent made this distinction, but it does not follow that the distinction was an unlawful one. For, under Great Dane, "discrimination" can be lawful if there is a legitimate and substantial justification for it. In our view, there was such a justification. That justification was to place economic pressure on the Union and the employees to accept the

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9. We distinguish Daily News of Los Angeles, 314 NLRB 1236, (1994), *enfd.* 73 F.3d 406 (D. C. Cir. 1996), *cert. denied* 519 U.S. 1090 (1997), cited by our colleague, where the Board found the employer's unilateral action (of withholding annual merit wage increases from employees during negotiations for an initial contract) was "inconsistent with the right to bargain collectively under Sec. 8(a)(5) and (1)" and thus not to be analyzed under Great Dane, supra. Instead, we find the situation more similar to the lockout found lawful in American Ship, supra at 310, distinguished in Daily News of Los Angeles, supra at 1243, where the purpose of the lockout was found "merely to bring about a settlement of a labor dispute on favorable terms," and thus not "inconsistent with the right to bargain collectively." As noted above, the parties have stipulated that throughout the course of negotiations, the Respondent and the Union met and bargained in good faith.

Respondent's bargaining position.[10] Concededly, the lockout was not a total one. But that does not remove the justification. The non-strikers and crossovers had decided that they did not wish to suffer the loss of pay associated with a strike. It makes no difference whether they did so because they no longer shared the Union's goals or because they simply could not afford to go without a paycheck.[11] The significant point is that it was no longer necessary for the Respondent to place additional pressure upon them in order for Respondent to achieve its bargaining goals, for these employees had already eschewed the strike weapon during the strike.[12] To be sure, the Respondent could have locked them out as well. However,

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10. As noted above, this is the business justification that the Respondent has asserted at all times since its September 6 letter to the Union notifying it of the lockout. Thus, our dissenting colleague incorrectly claims that we have "improvised" this business justification.

11. Our dissenting colleague asserts that the non-strike/crossover employees' subjective reason for working during the strike "makes all the difference." We disagree. Irrespective of their reasons, the significant point is that the Respondent considered it unnecessary to place the same pressure on them as on those who stuck with the strike until the end of the strike. And, our colleague errs when he says that the latter group eschewed the strike weapon. They stuck with it until the end of the strike.

12. On the other hand, those employees who continued to strike until the Union's unconditional offer on August 31 did not eschew the strike weapon during the strike and, therefore, it was a legitimate business justification for the Respondent to exert additional economic pressure on them in order to achieve its bargaining goals. Thus, we do not agree with our dissenting colleague that the Respondent could not make a lawful distinction between those employees who eschewed the strike weapon during the strike and those who stayed on strike until the end of the strike.

there is nothing in the law that requires an employer to use the maximum economic pressure. If the employer believes that lesser pressure will suffice, he can use that lesser pressure.[13]

At bottom, the issue here is whether the distinction made by the Respondent (nonstrikers and crossovers vs. those who stayed on strike) was for the purpose of punishing the latter or was for the purpose of winning the economic battle. We believe that the General Counsel has not shown the former.[14]

The main argument of the General Counsel and the Union is that the timing of the lockout demonstrates animus. As discussed above, they contend that the Respondent

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13. See *International Paper Co. v. NLRB*, 115 F.3d 1045, 1052 (D.C. Cir. 1997) (discussing business justification standard); *Tidewater Construction Corp.*, 333 NLRB 1264, 1269 (2001), *order vacated on other grounds sub nom. Operating Engineers Local 147 v. NLRB*, 294 F.3d 186 (D.C. Cir. 2002), *supplemental decision on remand* 341 NLRB No. 55 (2004) (reasonable justification for employer to distinguish between crossover employee and those who were strikers and still opposed employer's contract demands when implementing lockout); *Sociedad Espanola de Auxillo de Puerto Rico*, 342 NLRB No. 40 (2004) (employer's reasonable concern for continuing operations sufficient to establish business justification); *Harter Equipment*, 280 NLRB 597, 600 fn. 9 (1986) (nonfrivolous reason sufficient), *affd. sub nom. Operating Engineers Local 825 v. NLRB*, 829 F.2d 458 (3d. Cir. 1987).

14. Since the Respondent showed a legitimate justification for locking out the one group and not the other, the burden was on the General Counsel to show that the real motive for the distinction was to punish those who stuck with the strike.

purposefully delayed implementing the lockout from August 31 until September 6 to allow the six crossover employees who had offered to return to work before August 31 to be reinstated and processed onto the payroll before the start of the lockout. We find no meaningful evidentiary support for this contention, however. Neither the General Counsel nor the Union point to any specific evidence, and we find none in the record, establishing that the Respondent timed the commencement of the lockout because of antiunion considerations. Nothing in the record contradicts the parties' explicit stipulation that the Respondent simply advised the Union on September 4 that it "was evaluating the Union's offer to return to work" and "had not reached any decision." We cannot make a finding that the Respondent's lockout was unlawfully motivated based on nothing more than speculation.[15] There is no independent evidence that the Respondent's partial lockout was motivated by antiunion animus, and the dissent does not contend otherwise.[16]

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15. Although the Board "is permitted to draw reasonable inferences, and to choose between fairly conflicting views of the evidence[,]" it "cannot rely on suspicion, surmise, implications, or plainly incredible evidence." *Concepts & Designs, Inc. v. NLRB*, 101 F.3d 1243, 1245 (8th Cir. 1996) (internal quotation omitted).

16. Compare *O'Daniel Oldsmobile, Inc.*, 179 NLRB 398, 402 (1969) (partial lockout unlawful where "abundant" evidence of antiunion animus present); *ABCO Engineering Corp.*, 201 NLRB 686, 689 (1973), *enfd.* 505 F.2d 735 (8th Cir. 1974) (table) (antiunion remark by company president supported finding unlawful shutdown of plant to all employees but one nonstriker).

Appendix B

IV. CONCLUSION

The Supreme Court long ago made clear that "proper analysis" of lockouts "demands that the simple intention to support the employer's bargaining position as to compensation and the like be distinguished from a hostility to the process of collective bargaining which could suffice to render a lockout unlawful." American Ship Building Co. v. NLRB, supra, at 309. The record shows, and we conclude, that the Respondent's lockout at issue here falls firmly into the former, lawful category.

CONCLUSIONS OF LAW

1. Respondent Midwest Generation, EME, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Electrical Workers, Local 15, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not violated the Act as alleged in the complaint.

Appendix B

ORDER

The complaint is dismissed.

Dated, Washington, D.C., September 30, 2004

Robert J. Battista Chairman

Peter C. Schaumber Member

MEMBER WALSH, dissenting.

There can be no doubt that the Respondent's partial lockout discriminated among bargaining unit employees based on the extent of their exercise of the protected right to strike. Employees who participated in the strike for its full term were not permitted to return to work. By contrast, employees who did not participate in the strike at all (nonstrikers) and employees who initially participated in the strike but then abandoned it (crossover employees) were permitted to return to work. Because "it has been proved that the employer engaged in discriminatory conduct . . . , the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him." *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967). The majority acknowledges that there was "discrimination" within the meaning of Great Dane, but argues that there was a legitimate and substantial business justification for it. The record shows, however, that the Respondent has failed to provide any substantiation for its asserted business justification. Therefore, a violation of

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Section 8(a)(3) has been established under the framework set forth in *Great Dane*.[1]

The Respondent does not argue that it needed the nonstrikers and crossover employees to maintain operations during the lockout.[2] Further, there is no evidence whatsoever in the record establishing that the Respondent retained the nonstrikers and the crossover employees in order to continue operating during the lockout. To the contrary, the Respondent stipulated that during the strike that immediately preceded the lockout it "successfully" maintained operations using only "supervisory personnel, contractors and some temporary employees."

Notwithstanding the complete lack of supporting argument and evidence, the majority sua sponte proclaims that the Respondent's operational needs justified the partial lockout. The majority's concoction of a post hoc operational rationalization for the partial lockout does not and cannot fulfill the Respondent's obligation to proffer a legitimate and substantial business justification. See *Inland Steel Co.*, 257 NLRB 65, 68 (1981) ("The employer alone is responsible for its conduct and it alone bears the burden of explaining the motivation for its actions."), *enfd.* 681 F.2d 819 (7th Cir. 1982) (table).

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1. Because the Respondent has not shown a business justification, we need not decide whether the partial lockout was "inherently destructive" of employee rights or whether the adverse effect was "comparatively slight." 388 U.S. at 33-34.

2. In two prior cases, the Board found partial lockouts to be justified by business exigencies. See *Bali Blinds Midwest*, 292 NLRB 243 (1988); *Laclede Gas Co.*, 187 NLRB 243 (1970).

I accordingly turn to the business justification that the Respondent, in fact, has advanced. The Respondent contends that it did not lockout the nonstrikers and the crossover employees because they "had removed themselves from the Union's economic action," and pressuring them to abandon the Union's bargaining demands was unnecessary. The Respondent, however, presented no evidence of any kind establishing that the nonstrikers and the crossover employees in fact abandoned the Union's bargaining position. Neither the Respondent nor the majority has cited any factual basis whatsoever substantiating the asserted business justification. See *Great Dane Trailers*, *supra*, 388 U.S. at 34 (employer must "come forward with evidence" of its business justification).[3]

Absent such required evidence, the Respondent's business justification rests only on the questionable proposition that working for a struck employer may, without more, be equated with abandonment of the Union's bargaining demands. The Board and the courts, however, have long recognized that employees may cross their union's picket line for numerous reasons. These reasons include economic concerns, an unwillingness to support the particular strike

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3. Compare, e.g., *Central Illinois Public Service Co.*, 326 NLRB 928, 931 (1998), *rev. denied sub nom. Electrical Workers Local 702 v. NLRB*, 215 F.3d 11 (D.C. Cir. 2000), *cert. denied* 531 U.S. 1051 (2000) (respondent's proffered business justification supported by "documentary evidence"); and *A.S. Abell Co. v NLRB*, 598 F.2d 876, 879 (4th Cir. 1979)("proof teeming" of respondent's business justification); with *Allied Industrial Workers Local 289 v. NLRB*, 476 F.2d 868, 878 (D.C. Cir. 1973) (respondent failed to prove business justification where it did not introduce supporting testimony).

in progress, an unwillingness to gamble on the success of the strike, and a philosophical objection to strikes in general.[4] But the Respondent does not provide any principled basis for selecting its preferred reason. Thus, the Respondent's business justification is based on nothing more than speculation as to the motive of the crossovers and the nonstrikers.

Surprisingly, the majority claims that "[i]t makes no difference" why the crossovers and the nonstrikers acted as they did. Actually, it makes all the difference. Under Great Dane, the burden is on the Respondent to establish a business justification for the partial nature of its lockout. As discussed above, the Respondent's asserted business justification rests on the premise that, unlike the full-term strikers, the crossovers and the nonstrikers abandoned the Union's bargaining position. That premise was not proven. Therefore, the Respondent has utterly failed to substantiate its asserted business justification.[5]

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4. See, e.g., *Pennco, Inc.*, 250 NLRB 716, 717-718 (1980), *enfd.* 684 F.2d 340 (6th Cir. 1982), *cert. denied* 459 U.S. 994 (1982); *Windham Community Memorial Hospital*, 230 NLRB 1070, 1073 (1977) ("employees who, for whatever reason, rejected the strike as a means for attaining bargaining objectives"), *enfd.* 577 F.2d 805 (2d Cir. 1978); *Allied Industrial Workers Local 289 v. NLRB*, *supra*, 476 F.2d at 881. See generally *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990).

5. The majority's reliance on *Tidewater Construction Corp.*, 333 NLRB 1264, 1269 (2001), *order vacated sub nom. International Union of Operating Engineers, Local 147 v. NLRB*, 294 F.3d 186 (D.C. Cir. 2002), *supplemental decision on remand* 341 NLRB No.

(Cont'd)

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The majority further attempts to justify the partial nature of the lockout on the basis that the crossovers and the nonstrikers had "already eschewed the strike weapon during the strike" and thus it was not necessary for the Respondent to lock them out. At the time the Respondent instituted its partial lockout, however, the entire bargaining unit had "eschewed" the strike weapon: the Union had ended the strike and made an unconditional offer to return to work.

The majority concludes that "[a]t bottom" the General Counsel has not shown that "the distinction made by the Respondent (nonstrikers and crossovers vs. those who stayed on strike) was for the purpose of punishing the latter." Under Great Dane, however, the General Counsel was not saddled with that burden. Because the General Counsel has established that the adverse effect of the Respondent's discriminatory conduct on employee rights was at least "comparatively slight," and because the Respondent has not "come forward with evidence of legitimate and substantial business justifications for the conduct," under the Great Dane framework "an antiunion motivation [need not] be proved to sustain the charge." 388 U.S. at 34.

(Cont'd)

55 (2004), is misplaced. Tidewater involved only one single crossover employee, who resigned from the union, and was not locked out. Here, none of the approximately 53 crossover employees resigned from the Union. Thus, the judge's statement in Tidewater that the lone employee was "apparently" willing to abandon the union's bargaining demands is premised on facts not present here. Further, neither the Board nor the reviewing court specifically addressed the judge's finding.

Appendix B

A partial lockout distinguishing between strikers and nonstrikers has a powerful negative effect on Section 7 rights. The effect of the lockout's disparate treatment of employees is to undermine adherence to the Union by demonstrating to employees the advantages from the standpoint of job security of refraining from concerted activity. *McGwier Co.*, 204 NLRB 492, 496 (1973); *O'Daniel Oldsmobile, Inc.*, 179 NLRB 398, 402 (1969). For this reason, the law requires that a partial lockout be justified by substantial business considerations.[6] As discussed above, the Respondent does not even argue that it needed the nonstrikers and the crossovers to maintain operations during the lockout. Nevertheless, the majority asserts an operational justification on the Respondent's behalf. Apparently recognizing the weakness of its position, the majority improvises a second "justification" that has nothing at all to do with continuing business operations: the majority asserts that the Respondent was privileged to discriminate against its employees for the purpose of placing economic pressure on them and the Union to accept the Respondent's bargaining position. It is well established, however, that "not all economic weapons seriously affecting employee rights may be employed with impunity merely because employed in aid of one's bargaining position." *Daily News of Los Angeles*, 315 NLRB 1236, 1243 (1994), *enfd.* 73 F.3d 406 (D.C. Cir. 1996), *cert. denied* 519 U.S. 1090 (1997). Given the significant adverse effect of the Respondent's partial lockout on Section 7 rights, and the complete absence of any argument or evidence of an operational justification for it, the majority errs in validating

6. See *Sociedad Espanola de Auxillo de PR*, 342 NLRB No. 40 (2004) (Member Liebman dissenting) (merely articulating a plausible reason for a lockout is not enough to establish business justification).

its use by simply declaring it a permissible tactic to gain bargaining leverage.

In conclusion, the majority here has abdicated its responsibility to evaluate the Respondent's business justification. Instead, it invents its own justifications and ignores the one the Respondent has presented. By doing so, the majority has effectively negated the business justification requirement entirely. The majority's one-sided approach fails to reckon with the "ultimate problem" in determining the lawfulness of the Respondent's partial lockout: "the balancing of the conflicting legitimate interests." *NLRB v. Truck Drivers Union*, 353 U.S. 87, 96 (1957).

Dated, Washington, D.C., September 30, 2004

Dennis P. Walsh Member

National Labor Relations Board

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED JANUARY 4, 2006 AMENDED JANUARY 11, 2006

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

AMENDED January 11, 2006
January 4, 2006

Hon. JOEL M. FLAUM, *Chief Judge*

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. DIANE S. SYKES, *Circuit Judge*

No. 05-1058

LOCAL 15, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

MIDWEST GENERATION, EME, LLC,

Intervenor.

Appendix C

Petition for Review of an Order of the
National Labor Relations Board

No. 13-CA-39643-1

ORDER

On consideration of the petitions for rehearing and petitions for rehearing en banc filed in the above-entitled case on December 13, 2005, by respondent, and December 15, 2005, by intervenor, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petitions for rehearing be, and the same is hereby DENIED.